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WM. R. STANS

No. 422

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

BRIEF OF PETITIONER.

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SUBJECT INDEX.

Page.

Statement of the Case 1

The Questions Involved:

I. The facts do not bring the case within the Safety Appliance Act. The car had ceased to be "used" as contemplated by the Act.. 5

II. The defective drawbar did not proximately contribute to the injury..... 5

A. Three intervening forces 5

1. Ring's direction to Quist resulting in the movement 5
2. Ring's violation of the rules.... 5
3. Ring did not step out from between the cars when movement started, but rode on the sagging chain 6

B. The probability that an injury would be caused by the alleged violation of the Safety Appliance Act was so unlikely as to be unforseeable 6

III. The question of Ring's violation of rules should have been submitted to the jury... 6

Specifications of Error 7

Argument, Points and Authorities 10

I. Not a Safety Appliance Case 10

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II. The defective drawbar did not proximately contribute to the injury in this case.....14
A. Three intervening forces 16
B. Injury from alleged violation of Safety Appliance Act, improbable 30

III. Question of Ring's violation of rules should have been submitted to the jury...34

Conclusion 39

INDEX OF CASES.

Page.
Atchison, Bowers vs. 37
Behne, San Antonio, etc. Ry. Co. vs. 32
Boldt vs. Penn. Ry. Co. 12
Bowers vs. Atchison, etc. 37
Central Vermont Ry., Gilman vs. 15
Chicago, etc., Ry. Co., Hampton vs. 36
Craig, Lake Erie, etc., vs. 37
Davis vs. Hand 25
D. L. & W., Kemp vs. 28
Detroit, Gleason vs. 37
Director General, Patterson vs. 29
Douglas vs. Washington Term. Co. 28
Fernette vs. Pere Marquette Ry. 36
Fletcher vs. S. D. Cent. Ry. Co. 22
Gilman vs. Central Vermont Ry. 15
Gleason vs. Detroit 37
Great Northern Ry. Co. vs. Hooker 37
Great Northern Ry. Co. vs. Wiles 24

Hand, Davis vs. 25
Hooker, Great Northern Ry. Co. vs. 37
Hampton vs. Chicago, etc., Ry. Co. 36
Illinois, etc., vs. Winslow 20
Kemp vs. D. L. & W. 28
Kentucky, etc., Ry. vs. Minton 23
Lake Erie, etc., vs. Craig 37
McCalmont vs. Penn. Ry. 10
Martin, Peterson vs. 33
Minton, Kentucky, etc., Ry. vs. 23
Patterson vs. Director General 29
Peterson vs. Martin 33
Penn. Ry. Co., Boldt vs. 12
Penn. Ry. So., McCalmont vs. 10
Penn. Ry. Co., Phillips vs. 27
Pere Marquette Ry., Fernette vs. 36
Phillips vs. Penn. Ry. Co. 27
Rittenhouse vs. St. L. & S. F. Ry. Co. 25
St. L. & S. F. Ry. Co., Rittenhouse vs. 25
San Antonio, etc., Ry. Co. vs. Behne 32
South Dakota Cent. Ry. Co., Fletcher vs. 22
Washington Term. Co., Douglas vs. 28
Wiles, Great Northern Ry. Co. vs. 24
Winslow, Illinois, etc., vs. 20

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BRIEF OF PETITIONER.

STATEMENT OF CASE.

(The figures in parenthesis refer to the folios in the printed record.)

This case is brought to this Court upon a Writ of Certiorari granted to petitioner (the defendant below) to review a judgment of the Supreme Court of the State of Minnesota (650) affirming a judgment of the District Court of Yellow Medicine

County (624) entered upon a verdict of a jury (543) awarding damages in the sum of $25,000 to plaintiff for the death of Ring, who received fatal injuries while in petitioner's service as a brakeman.

On October 4, 1922, a west-bound freight train, upon which Ring was employed as rear brakeman, stopped at Budd, Iowa (31-33), to take siding and meet an east-bound train. Ring's train stopped just before it reached the passing track switch; the switch was thrown and the train started to pull in on the siding. In starting the train, a draw-bar was pulled out and an immediate stop was made (33).

The train was standing on a reverse curve and the conductor (O'Leary) sent Ring to tell the head end brakeman (Quist) to get in position where he could pass on signals to the engine (34). Ring did this; the head end backed up and was chained to the bad order car for the purpose of pulling the train in on the passing track, and cutting the bad order car out of the train (35 and 65). They pulled in on the passing track and stopped. The movement contemplated was to bring the engine around to the rear of the train, remove that portion of the train behind the bad order car, leave the bad order car standing on the passing track, couple the two parts of the train together, and proceed (64-69).

After the train had come to a stop on the passing track, Ring told head brakeman Quist to cut off the engine, and bring it to the rear of the train (298-302-306).

After sending Quist to the engine, Ring and O'Leary, without the knowledge of Quist or the enginemen, went to the bad order car to unhook the chain (36), one stood on each side of the coupler (37). As they were working there, the car upon which they were working ran back nearly a car length.

The Minnesota Supreme Court not quite accurately says: "The train *backed* up without warning and the conductor straightened up and walked back with the movement of the train" (596). The train did run backward a *few* feet because it was standing on a grade. No "warning" to Ring was called for because the movement was made in compliance with Ring's direction to Quist. *Some* movement was bound to occur in following Ring's direction. The Court also says, in exact accordance with the facts, "the decedent, however, reached in and locked his arms around the axle of the bad order car and the chain at the time was slack and was not unhooked, and *he swung his body up over the chain, apparently to ride thereon* in the brief movement of the train" (596).

He made no effort to step out from between the cars, although, as the conductor testified, his "idea would be to get out of there" (42). The backward movement was very slow—about two miles an hour (43). The train stopped suddenly, bringing the chain up taut, squeezing Ring between the chain and the draft timber above him, from which injury he died about fifteen days later.

The cause of the train movement is described by brakeman Quist. He could not uncouple because

the pin was held tight because of position of train on the grade (302). He first secured "slack" by a short backing movement of the engine (303). He uncoupled and signaled the engine to go ahead. The train was standing on a grade (325-326), and when the engine was cut off, started a slow backward movement. Brakeman Quist turned the angle-cock on the head car and set the air (304). The front car ran back from five to seven feet (304). The car where Ring was hurt ran back about 40 or 42 feet (43). It was during this short movement that Ring received the injuries from which he died.

There was a rule of the company providing that employes must give the engineer knowledge that they are going between or under cars and they must know that the engineer has seen and understood the signal before they go between cars (266-267). Ring gave no warning to the engineer that he was going between the cars (268-269). He was familiar with the rule, as well as with the grade on which the train stood (264-265). He went in there on his own accord (40). The trial court refused to permit the jury to consider this rule or its violation in connection with determining the proximate cause of the injury, or for any other purpose (562-563).

An appeal was taken to the Supreme Court of Minnesota from the order of the trial court denying an alternative motion for judgment notwithstanding the verdict, or for a new trial (578).

On April 17, 1924, the Minnesota Supreme Court

affirmed the order of the trial court, and ordered judgment for the respondent (587-614 inclusive). Final judgment was entered in District Court against your petitioner on May 8th and affirmed by the Supreme Court of Minnesota on May 20, 1924 (641).

A writ of certiorari was sought in this court and granted on June 9th, 1924 (Page 219 of Record).

The Questions Involved.

The questions involved herein are as follows:

First. The facts do not bring the case within the Safety Appliance Act. The car had ceased to be "used" as contemplated by the Act.

Second. The defective draw-bar did not proximately contribute to the injury.

(A) There were three active forces intervening, which, when combined, constituted the intervening, efficient force and operated to make the faulty coupler a remote cause or condition, to-wit:

(1) Ring himself directed Brakeman Quist to cut off the engine without advising him or the enginemen that he was going between the cars. *In carrying out Ring's directions the movement of the train took place. Ring thus controlled the movement of the train* (298-300).

(2) In placing himself between the cars without notifying the engine crew, he knowingly and wilfully violated a rule promulgated for his benefit and safety (264-265). This was more than

contributory negligence in view of the directions he gave Quist with the train standing on a grade.

(3) When the backward movement started, instead of stepping out from between the cars to a place of safety, as he should have done (42), and as the conductor did (38-42), he swung his legs and then his body up, and over the sagging chain, and, by so doing, deliberately invited death or serious injury. The chain pulled taut when the movement ceased and he was caught between the chain and draft rigging. The emergency was created by Ring's instructions to Quist and Ring's going between the cars without notice to Quist or the enginemen.

(B) The probability that an injury would be caused by the alleged violation of the Safety Appliance Act was so unlikely under all the circumstances that it could not reasonably be foreseen. No one would anticipate that Ring would put himself in the position he assumed at that time, especially in view of Ring's knowledge and violation of the rule made for his protection.

Third. The question of deceased's violation of rules should have been submitted to the jury. The violation of the rule constituted negligence subsequent to and independent of the question of defective safety appliance. Your petitioner was entitled to have this fact considered by the jury in determining the proximate cause of the injury.

These questions were all raised at the trial and were presented to the Minnesota Supreme Court on appeal.

They were preserved by setting them out as error in the motion for judgment notwithstanding the verdict or a new trial; by assignments of error to the Minnesota Supreme Court and by specifications of error to this court.

We seek in this court judgment for defendant notwithstanding the verdict for plaintiff, and, in the event that be denied, we ask a new trial be ordered.

SPECIFICATIONS OF ERROR.

I-a.

The Court erred in charging the jury as follows:

> "Plaintiff has asked me to instruct you that the fact that the company had rules, which rules are in evidence, and that the decedent violated those rules, would not be a defense to the company, or defendant. That, I believe, is a correct interpretation of the law, that will not be a defense, the fact that he violated those rules." (Transcript, p. 188.)

I-b.

The Court erred in refusing defendant's requested instructions as follows:

> "Mr. Briggs: Will the Court extend that instruction so as to say that this question of

rules may be taken into consideration by the jury in determining whether the defective drawbar was the proximate cause of the accident?

Court: I don't believe that is the law as laid down by our Supreme Court." (Transcript, p. 188)

II.

The Court erred in denying the motion of defendant that a verdict be directed in its favor at the conclusion of the testimony and denying defendant's motion for judgment notwithstanding the verdict, it appearing as a matter of law that deceased's own negligence was the proximate cause of his death.

III.

The Court erred in submitting the case to the jury on the theory of a defective safety appliance.

III-a.

The Court erred in charging the jury as follows:

"The railroad company is made negligent as a matter of law in having a defective coupler; also, the fact that they were going to move the same on the track wouldn't be material at this time, or when this accident occurred." (Transcript, p. 186)

III-b.

The Court erred in charging the jury as follows:

"It is not disputed that at the time of the injury to Ring, defendant was moving and

hauling a certain car, the coupler and drawbar of which was defective." (Transcript, p. 186)

III-c.

The Court erred in charging the jury as follows:

"If you find that this coupler and drawbar was in fact defective, then the question for you to determine is whether or not this defect contributed in whole or in part as a proximate cause to the injury and death of Edmund Ludwig Ring." (Transcript, pp. 186-7.)

III-d.

The Court erred in charging the jury as follows:

"If you find that because of the defect deceased did go between the ends of the cars and did attempt to make the uncoupling, then you would determine whether or not the defect was the proximate cause of decedent's injury and death." (Transcript, p. 187)

III-e.

The Court erred in charging the jury as follows:

"If you find from the evidence that the coupler was defective and that such defect was the proximate cause of the injury to decedent, then the plaintiff is entitled to recover." (Transcript, p. 187.)

IV.

The Minnesota Supreme Court erred in failing to find error in each of the above quoted portions of the charge, all of which were presented to it on appeal.

V.

It was error for the Minnesota Supreme Court not to grant judgment for the defendant, or, in the alternative a new trial in which the errors complained of could be corrected.

ARGUMENT, POINTS AND AUTHORITIES.

I.

SPECIFICATION OF ERROR III AND SUBDIVISIONS.

THE FACTS DO NOT BRING THE CASE WITHIN THE SAFETY APPLIANCE ACT. THE CAR HAD COME TO REST ON THE SIDETRACK AND HAD CEASED TO BE "USED" AS CONTEMPLATED BY THE ACT.

As stated in a recent Federal case involving Section 2, Act of March 2, 1893, as amended 29 Stat. 85, and Act of March 2, 1903, 32 Stat. 943, "the association of the word 'used' with the words 'hauled or permitted to be hauled on its line' clearly indicates that the use must be associated with or related to the transportation or hauling of a crippled car, either in transportation from place to place or of the car from the place where found to be defective or insecure to the place of repair. It does not mean such use of the car elsewhere or in other relation than such hauling or movement."

McCalmont v. Penn. Ry. (1921), 273 Fed. 231.

Aff. 283 Fed. 736.

And this also is what the defendant contends is meant by the term "use."

Let us examine the immediate facts of the case. The draw-bar had pulled out on the main line at Budd. It was then chained up and hauled onto the sidetrack, to be cut out of the train. During this movement nothing occurred. The car was safely hauled to a place on the siding where it was to remain. Having so been placed on this sidetrack, it ceased to be "used" by the carrier. From this time on, then, the Safety Appliance Act did not govern the case. To illustrate our point we recite the facts and holding in the McCalmont case, supra. The defective car had been placed on a siding. It was chained to another car and deceased went between the cars to adjust the chain length without putting out a signal as required by the rules. While so doing another car was "kicked in," colliding with the defective car and killed the plaintiff's intestate. The Court there said:

> "In addition thereto it does not seem to me that the car which caused the injury was in use within the meaning properly to be given to that word under the Safety Appliance Act. The defendant was not hauling it or permitting it to be hauled or used on its line. It had taken it out of use and placed it on a dead track and the hauling or the movement of it from that dead track to the repair place which is permitted to be done only at the risk of the defendant, had not yet begun, and was not then in immediate contemplation * * * he was merely making a temporary repair to the car upon the dead track so that at some future

time it might thus be moved or hauled. The law does not forbid or prohibit work upon a car on a dead track so as to put it into condition thus to be moved or hauled; nor does the law impose an absolute liability upon the interstate carrier for injury sustained by one engaged in doing that kind of work. In that situation and while doing that kind of work the applicable law, it seems to me, would be the negligence rules provided by the Federal Employers' Liability Act and not the absolute liability of the Safety Appliance Act.

For the foregoing reason I am of the opinion that defendant's motion (for judgment) should be granted."

McCalmont case, supra, at page 240.

Now, in that case, and in the one under discussion, the salient points are the same, in that in both the car was on the siding; the car was standing still; there was a defective coupler; the deceased was adjusting or uncoupling a connecting chain, and there was a violation of the company's rules governing the situation.

As in that case the car was out of service. It had ceased to be "used." If intending to permit a car to stand still constituted a violation of the act, the company could have no alternative but to violate the law. If they hauled the car they violated the act, and if they did not haul the car they violated the act.

In *Boldt v. Pennsylvania R. R. Co.*, 245 U. S. 441, a conductor was endeavoring to adjust a faulty coupler at one end of a string of cars when other

cars were shoved in on the same track and struck the one he was working on in such a way as to kill him.

In denying the plaintiff's requested instruction upon assumption of risk, the trial court said:

> "Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads: 'Such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.' I decline to charge as requested, because this is not an action of the kind specified in Sec. 4."

The refusal of the requested instruction was sustained by this court.

We see no essential difference in the situation in that case and the one at bar. It cannot be that the company is without an alternative to avoid the absolute liability of the Act under these circumstances, whether it uses the car or sets it out. This car was no longer being "used" by defendant and had been placed on the siding to avoid using.

This case does not come under the Safety Appliance Act. It comes under the Federal Employers' Liability Act.

II.

Specifications of Error I, II, IV.

THE DEFECTIVE DRAW-BAR DID NOT PROXIMATELY CONTRIBUTE TO THE INJURY IN THIS CASE.

The question of whether a particular act is remote or proximate, is purely a question of law. The jury may have a function in drawing certain inferences and determining disputed facts, but where the facts are clear the court, through definite principles of law, determines the limits of proximity and does not leave it to the jury.

There are, ordinarily, four divisions of causes: The formal, the efficient, the material and the final. The formal and the final causes are metaphysical and we are therefore only concerned with the "efficient," that is, the active force, and the "material," the passive force upon which the active force operates. The causes of an event are all the preceding circumstances which brought the event to pass and they may be numberless. The consequences of an event, however, which still remain "efficient" are very few. The question is what is the final, sole, efficient cause, for this is the proximate cause and to it must be attributed the legal reason for the accident.

While the defective coupler under the law may have at one time constituted an active force, it had, prior to the accident, when the car had come to rest on the sidetrack, becomes a *passive* force. Each

time one or more active causes operates on a condition to create a new condition, a new causal step is taken, ending with a given result. This result is the direct result of the active force which last acted upon the immediately precedent condition, and is the indirect result of the earlier acting forces. *In other words, the subsequent coming into action of any other force is the direct cause of the result.* All other forces are indirect and at the time of the intervention become remote. The final active force must be the efficient cause which is more commonly called proximate.

A very plain illustration of the principle is found in *Gilman v. Central Vermont Ry.*, 107 Atl. (Vt.) 122. In that case a train stood more than five minutes across a highway, in violation of law, and plaintiff's automobile driving along the highway collided with it, the position of the train was held not to be a proximate cause of the collision, but only a condition. This was so because the direct result of a passive force is not necessarily proximate, proximity of result following primarily the active line.

The most common way of enunciating the rule of liability is that the injury must be the natural and probable or natural and proximate result of defendant's act. A more accurate phrase would be that *the intervening force must be forceable, otherwise the result is made remote.*

A. THERE WERE THREE ACTIVE FORCES INTERVENING, WHICH, WHEN COMBINED, CONSTITUTED THE INTERVENING EFFICIENT FORCE AND OPERATED TO MAKE THE FAULTY COUPLER A REMOTE CAUSE OR CONDITION, TO-WIT:

1. Ring himself sent the brakeman, Quist, with directions to cut off the engine. It was in carrying out his direction that any motion of the train took place. Ring controlled the movement of the train (298-299-300).

2. In placing himself between the cars without notifying the engine crew, he knowingly and wilfully violated a rule promulgated for his benefit and his safety (264-265), which constitutes more than contributory negligence, and especially so in view of his instruction to Quist. Danger was not remote, but immediately imminent. The violation of this rule constitutes negligence. 18 R. C. L., Sec. 152.

Its relation to proximate cause will be discussed under the next subdivision of this brief.

3. Again, when the backward movement started, instead of stepping out from between the cars to a place of safety, as he could well have done, and as the conductor did (38 and 42), he swung his legs, then his body up and over the sagging chain, and by so doing deliberately invited death, or serious injury. The chain very naturally pulled taut when the movement ceased and he was caught between the chain and the draft rigging.

The statement contained in the opinion of the Minnesota Supreme Court with reference to Ring's further acts, after he had gone between the cars and the slow backward movement had commenced, is as follows:

> "* * * the conductor straightened up and walked back with the movement of the train. The decedent, however, reached in and locked his arms around the axle of the bad order car and the chain at the time was slack and was not unhooked, and *he swung his body up over the chain apparently to ride thereon* in the brief movement of the train, and the slack ran back—by the head cars stopping—and as the chain pulled straight, it squeezed the body of decedent between the chain, then under him, and the bottom of the draft timbers of the car above him." (596)

The evidence adduced by plaintiff does not present any reason or excuse for this action of Ring. Counsel for plaintiff thoroughly examined and cross-examined the conductor both on taking depositions and at the trial. Full opportunity was presented them to have the sole witness explain conditions that might have made this conduct reasonably necessary or at least excusable. The conductor testified that he walked back with the movement of the train while "*he* (Ring) *reached in and locked his arms around the axle of this bad order car* and this chain at the time was slack in there and wasn't unhooked, and he swung his body up over the chain. * * *" (38) Conductor O'Leary, the sole witness, says at folio 42, that "his idea would be to get out of there."

As stated above, the evidence discloses no palliative circumstances, but affirmatively shows a gross disregard of the consequences of his conduct by Ring.

Ring directed Quist to do what he did; Ring went between the cars immediately following the giving of this direction; Ring violated the company's rule as well as the common law rule by failure to give notice to the enginemen that he was going between the cars; and Ring omitted to follow the plainest line of conduct for his safety but got on the chain to ride. It seems plain that he effectively barred recovery on the ground that his own negligence was the proximate cause of the accident.

Brakeman Ring sent Brakeman Quist to cut off the engine and any movement that occurred resulted from carrying out this direction. Ring directed Quist as follows:

"Q. And then what did you do?

A. I stayed right there and waited a few minutes, not so very long, and got a signal to go ahead.

Q. And then what was done?

A. And then I says, what happened back there, did we get a draw-bar? Yes.

Q. Who did you say that to?

A. To Ring.

Q. Did Ring answer?

A. Yes, he said yes. I said, what shape or condition is it in, will she pull, I says, into clear? He says, that remains to be seen, go ahead and pull him in, and come around with the engine.

Q. What does that mean?

A. Well, I took it to mean that I should go in and go around with the engine.

Q. That expression?

A. *That means that, to go around about my business, to go up there and get into clear, and come back.*

Q. Cut off the engine?

A. Yes, cut off the engine and come back.

Q. Was that done?

A. Yes, sir.

Q. And the train was pulled in onto the passing track?

A. Yes, sir." (297-99)

Ring gave the order to Quist and *he thereby controlled the particular movement* that caused his death. Following the giving of this order he violated a fundamental rule that had been made for his guidance and safety by going between the cars without notice to the enginemen. He did this before his directions to Quist had been complied with and while a movement of the cars was imminent. When the engine was cut off, and in consequence thereof, the movement occurred. The fact that the conductor accompanied him when he went between the cars in no way relieves him from responsibility. The fact that a conductor was in charge of the train operates in no way to relieve Ring from his obligation to signal the engineer of his intent to go between the cars. The duty to give this signal rested on Ring whether he was in charge of the train or not. This obligation rests on all trainmen when going between cars in a train.

We are not trying to convert actual contributory negligence into proximate cause as has been contended by respondent.

The principles of causation have not been changed by any statute and remain as at common law.

> "It has been the policy of the common law to fix liability *in solido* with reference to the cause which stands closest to and in most immediate connection with the injurious result."
>
> 18 R. C. L. 156.
>
> See Ann. Cas. 1913 B. 791.

As it is said of compensation cases, the doctrine of *novus actus interveniens* always asserts itself in these cases, because it forms the basis of controversy, viz., the more immediate cause of the injury; but the weight of authority is to make the liability of the original actor depend upon whether such negligent or even wilful intervening act was foreseeable.

Pollack, Torts 37.

In addition to the rule of the defendant violated by Ring, the plaintiff is confronted with the following general common law rule: That a railroad employee when about to put himself in such a position with respect to a stationary car, if it should be moved unexpectedly, he would in all probability be injured, is bound to notify all other employes whose work may in its progress produce a movement of the car, or put out some signal which will show them where he is.

L. R. A. 1918 C., p. 380.

Illinois, etc., v. Winslow, 56 Ill. App. 462.

This rule, so far as we know, has universal support. In most of the decisions in which it is enunciated, however, recovery was denied because it was considered contributory negligence. Any court would, of course, rest its decision on this rather than take an unnecessary additional step to hold it the sole proximate cause. Comparatively recent statutory provisions have removed contributory negligence as a defense, and as yet but few cases have been passed upon as compared to the mass of decisions prior to the abolition of this defense.

The point we make is that merely because Ring's conduct constitutes contributory negligence, it does not bar proximate cause as a defense . Indeed it is in furtherance of it for it is but a step from contributory negligence to sole proximate cause and in view of the circumstances intervening, the one time negligence of the defendant became *remote* and at the time of the accident became the *occasion* which merely provided an opportunity for the intervening causal agencies to act; or it may even have set them in motion. The statute has not changed the rules relating to proximate cause.

The New International Dictionary says:

> "The *cause* of an effect is that which actually produces or brings it about; the *occasion* is that which either directly or indirectly provides an opportunity for the causal agencies to act or serves to set them in motion."

Whiting, J., says in *Fletcher v. S. D. Cent. Ry Co.*, 155 N. W. 3 (S. D.):

> "Under this statute where a railroad company failed to comply with the provisions of the Safety Appliance Act and such failure contributed to an injury suffered by an employee no act of the employee no matter how negligent it may be or to what extent it may in fact have contributed to the injury, can be urged as contributory negligence for purposes of defense. *Grand Trunk v. Lindsay*, 233 U. S. 42, 34 Supreme Court Reporter 584.
>
> But the negligent acts which are thus forbidden to be urged as a defense are those which in fact do merely *contribute* to the result. If an act of the employee is the *sole* cause of the result, it is not contributory, and the railroad company would not be liable therefor even under the provisions of the Employers' Liability Act. In this connection it is well to bear in mind the distinction between the *cause* of an act and the *occasion* for an act. An act may furnish the occasion for another act, and such second act may be the cause of any injury without the first act in any manner being a contributing cause of such injury; such second act may be the result of some intervening cause in no manner flowing from the original act, but which cause is given an opportunity to operate through the occasion furnished by such original act."

Counsel for plaintiff has cited a number of authorities in the court below holding that a rule not generally observed cannot be brought to life for a defense to a law suit. We call to the Court's at-

tention that there is not a scintilla of evidence of a single instance tending to show disobedience of the rule aside from the case at bar. From this the conclusion must follow that the rule was properly enforced and observed, and in any event this holding cannot be applied to nullify the rule of law so well established that going between cars without notice is negligence. Disobedience of law cannot be urged by the guilty party. The question of a wilful violation is infinitely important on the question of proximate cause, more especially that phase of it dealing with whether Ring's act was foreseeable by the defendant.

To illustrate the point where contributory negligence advances one step and becomes proximate cause, we cite *Kentucky, etc., Ry. v. Minton,* 180 S. W. 831.

In that case plaintiff undertook to repair a defective coupler on a car standing on the sidetrack, without putting out any signal that he was assuming a dangerous position. While in that position a string of cars was shoved in, moving the one upon which plaintiff was working, seriously injuring him. After reviewing the facts, the Court said:

> "We conclude, then, that under the facts and circumstances exhibited by the record, it was the duty of plaintiff to have observed the rule, unless same had been abrogated by some custom or usage ,or mode of conduct, or other excusing circumstances, in which all parties participated, *and his failure to do so constituted negligence on his part which was the sole producing cause* in law of his injuries."

And as in that case a rule which had not been abrogated by custom, usage or other mode of conduct was violated by Ring, resulting in his death. Wherein has the coupler played a part except as providing an occasion for his being there? A rule of law and a rule of the defendant's were both violated by Ring.

Great Northern Ry. Co. v. Wiles, 240 U. S. 444-448.

A drawbar in a freight train on which the deceased was rear brakeman pulled out, stopping the train. The deceased failed to guard the rear end of the train as it was his duty to do, but remained in the caboose. A rear end collision occured, killing the brakeman.

In reversing the appellate court, which had affirmed a judgment for plaintiff, this court said:

> "The pulling out of the draw-bar produced a condition which demanded an instant performance of a duty by Wiles—a duty not only to himself, but to others."

The Court then held that the negligence of Wiles was the sole proximate cause of the accident, and that his representative could not recover, even assuming the drawbar was defective.

In that case the deceased violated a rule by remaining in the caboose. In the case at bar the rule violation was effected in Ring taking his dangerous position between the cars without notice to the engine crew. All the more is this so in view of Ring's directions to brakeman Quist to do the very thing that was done.

The exact point involved in this case is well illustrated in the recent case of *Rittenhouse v. St. L. & S. F. Ry. Co.*, 252 S. W. 945 (Mo.). The syllabus reads:

> "Where a car repairman was injured immediately after placing himself in a perilous position between two cars on an active switching track, the fact that he failed to realize his peril did not relieve him of the duty to warn the crew of his intention to enter between the cars.
>
> *Held*, that his failure to warn the switching crew, and not the defective coupler, was the proximate cause of the injury by the movement of a third car."

The fact that Ring controlled the movement of the train is entitled to serious consideration by the Court. Illustrative of this point is the recent case of *Davis v. Hand*, 290 Fed. 73.

Hand was between the tender and an empty car endeavoring to effect a coupling. "On the third impact, the coupling made, evidently as the result of Hand having lined up or adjusted the couplings." Hand then signaled the engineer to go ahead and was caught and crushed between the cars and a coal shed which stood very close to the track. The Court said:

> "On the facts the plaintiff claims it is established as a matter of law that the Federal Safety Appliance Act was violated, and that such violation was the proximate cause of the accident and death of the deceased. It may be conceded that the reason the coupling was not made by impact on the first two attempts

was due to the failure of the couplings to work, either because of a misalignment of the drawbars or some defect therein and that after the first failure to couple, the deceased went between the cars for the purpose of lining them up, with the result the coupling finally made, as stated, on the third attempt. * * * In this class of cases the decision of this question only becomes material, if the alleged defects in the couplings, and the consequent violation of the act, was the proximate cause of the resulting accident."

After finding the coupling had been made, the Court goes on to say:

"It then became his duty to give the engineer the signal to move out, in such a manner and from such a position as he might elect. * * * He had the option to place himself in a safe position, either by climbing up onto the car, or by crossing to the far side of the track from the coal bin, and going forward to the engine. It is clear from the evidence that he deliberately took the most dangerous position, and gave the signal that resulted in the train going ahead and crushing him between the coal car and the bin. * * * Wherever he was, it was of his own choosing. No claim is made that the deceased was unfamiliar with his surroundings, or that he was engaged in an operation that was new to him."

The Court held:

"The proximate cause was the deceased's carelessness in placing himself in a dangerous position to give the signal, when he could have placed himself in a safe place before so doing.

> A new and intervening cause was set in motion by the deceased himself after the coupling had been made, and the necessity for his being between the cars, or in the position he was in had ceased."

In this case Hand gave the signal that moved the train. In the case at bar Quist gave the signal at Ring's direction, and so in effect it was Ring's signal.

A good illustration of a defective appliance providing an *occasion* for an accident and not being the proximate cause is found in *Phillips v. Penn. R. R.*, 283 Fed. 381, which was decided by the Circuit Court of Appeals, Seventh District, and commented on in *Davis v. Hand*, 290 Fed. at pages 77-8, as follows:

> "There the plaintiff, a locomotive fireman, went forward over the boiler to repair a defect in the automatic bell ringer, which under the law was negligence per se. On his return, and when stepping over the steam dome, the safety valve popped, causing him to lose his balance and fall. The safety valve popped because it had reached the pressure for which it was set. It was well said that the plaintiff would not have been in the position he was, except for the defect in the bell. But the Court held, that the defect was not the proximate cause, as Phillips knew the safety valve would blow at a certain pressure, and also whether it was likely to do so or not, as he was in charge of the fire."

In the case at bar it is plain that the deceased, Ring, would not have been in the position he was

except for the defect in the coupler. Beyond this there is no connection between the defective coupler and his injuries. As in the case last quoted, Ring knew whether the train was likely to move or not as he gave the direction which resulted in the movement. For the purpose of this case he was in charge of the particular movement that occurred even though he was not conductor of the train.

In the respect that Ring knew or should have known that the cars might move this case is similar to that of *Kemp v. D. L. & W.*, 122 Atl. 731 (N. J.), where a brakeman who had been informed of the movement cars would take, stood on the track over which the cars were to pass, although no duty required him to do so, was struck by the cars and killed, it was *held*, that the failure of the railroad company to have a man stationed on the leading car to give warning was not the proximate cause of the employe's death.

The case of *Douglas v. Washington Terminal Co.*, 298 Fed. 199, involves the same principle as the one at bar. In that case a brakeman at a car inspector's request signaled the engineer for slack so that the train could be divided and the inspector not having set the brakes on the rear section, the rear section drifted backward about 3 feet from the front section. The brakeman attempted to cross the track between the two sections. He was caught and crushed. The Court held, that the brakeman's movement across the track was an intervening proximate cause between the failure to set the brakes and his death.

> "With respect to the first of these charges we may say that the drifting movement of the rear section was not in fact or law the proximate cause of Douglas' injury, since a new and independent cause, to-wit, Douglas' movement across the track, intervened between the two events, and became the efficient and proximate cause of the injury. Therefore the plaintiff was not entitled to recover upon that ground."

In determining proximate cause it is immaterial whether the negligence be a violation of the Safety Appliance Act, failure to set brakes, or any conduct on the part of the railroad company, which in law amounts to negligence.

An analogous situation arose in *Patterson v. Director General*, 105 S. E. 746 (S. C.). In that case plaintiff, a yard conductor, was injured while operating a defective engine in violation of a rule forbidding the operation of engines by conductors. The following language expressed the opinion of the Court:

> "The purpose, importance and good sense of the rule forbidding him to do so were as obvious as was his duty to obey it. There was no reason or excuse, for his violating it; and however much we may sympathize with him in his misfortune we are constrained to hold that his conduct, whether it be called negligence or assumption of risk, absolves the defendant from liability for his injury."

And thus the violation of a rule was held the proximate cause of his injury.

B. THE PROBABILITY THAT AN INJURY WOULD BE CAUSED BY THE ALLEGED VIOLATION OF THE SAFETY APPLIANCE ACT WAS SO UNLIKELY, UNDER ALL THE CIRCUMSTANCES, THAT IT COULD NOT REASONABLY BE FORESEEN.

Was Ring's act in assuming this dangerous position under the circumstances of this case reasonably foreseeable by Quist or the enginemen drawing the train? They had been directed by Ring to do what they did do with no word or signal from Ring that he was going between the cars. They had a right to understand he was not between the cars. So understanding they were not negligent.

When the company lays down common sense rules for the protection of its employees may it not rely upon their observance, as the natural course of events? The rule book in this case provided as follows (267-268):

> "707. Employes must not assume that signals given an engineman have been seen and will be obeyed when obedience to those signals on the part of the engineman is essential to the safety of such employes in the performance of their duties. They must know that the signal has been seen, understood and obeyed, before placing themselves in a dangerous position, otherwise they assume all risks of danger arising from any misunderstanding or disregard of signals."
>
> (Ex. 26, Folios 267-268.)

That this rule was not complied with is evidenced by the testimony of Engineer Flower (268):

"Q. Did you get any information that

either Mr. Ring or Mr. O'Leary were between the cars?

A. No, sir.

Q. Did you have any knowledge at the time this uncoupling took place of your engine that anybody was between the cars?

A. No, sir."

And also by the testimony of Brakeman Quist, who was the only one through whom such signal could be given:

"Q. Did you know at that time that Ring was between the cars or in the train?

A. No, sir, I had no way to know it.

Q. Had you received any signal or warning that he was there?

A. None whatsoever.

Q. And you were following out his instructions when you cut the engine off and came around?

A. Yes, sir." (305.)

Because of the rash act of the deceased in omitting to notify or signal the engineer of his intended move, the latter was warranted in beheving it was safe to uncouple the engine from the train, especially on the orders of a brakeman sent there for that specified purpose by the deceased,—Ring. Quist had been ordered there to handle the engine, to direct the engineer in pulling in on the siding *and thereafter to cut off the engine and "come around."* To do so required slack, and this was well known to the deceased. He also knew the grade conditions.

This rule was made for the protection of the employees—each relies on the other's observance. It is one of the most valuable and beneficial rules promulgated by the company. There is no evidence of its disregard. Its observance constituted the very essence of safety and protection to fellow workers. It is not a rule that could be said to be in conflict with the law, but is in furtherance of the law—bringing home to men working side by side the duty imposed upon them by common prudence, and by the law without a rule.

The proximate consequences for which a defendant is liable are restricted to those which should reasonably have been foreseen, and we submit defendant was not required to foresee this grossly negligent conduct of Ring. To impose such a duty would be to impose the impossible. The coupler was out of use. The movement of the train was one of the causes of the accident. Ring's instructions to Quist was another, and Ring's violations of the rule was a third. All of these causes intervened after the coupler defect. The defective coupler, as stated, only provided the occasion.

Quoting from *San Antonio, etc. Ry. Co. v. Behne,* 231 S. W. 354 (Tex.):

> "*The causal connection between the negligence which put in motion that agency, and the injury, is not controlled by the fact that the agency acted directly upon the injured party.* The causal connection was broken in contemplation of law, by the intervention of disconnected and independent agencies

brought into being by a chain of circumstances so improbable as to render them in law unforeseeable."

As stated in *Peterson v. Martin,* 138 Minn. 195:

"* * * It is a well settled rule that if, subsequent to the original negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the injury, the original negligence is too remote."

The violation of the Safety Appliance Act, if any, had spent itself when the cars came to rest and was at most only reflected in the physical setting which the cases describe as the "occasion" or "condition" of the injury, as distinguished from its proximate cause.

We submit, in concluding this section of the brief, that the injury, under the evidence cannot be attributed to a violation of the provisions of the law, but only that, it provided the occasion for the accident. In other words, an attempt to apply the "but for" rule is made by the respondent. That rule has never been followed for it involved the tracing of endless conditions and circumstances too devious for the courts to follow and administer substantial justice.

III.

Specifications of Error I-a and I-b.

THE QUESTION OF DECEASED'S VIOLATION OF RULES SHOULD HAVE BEEN SUBMITTED TO THE JURY. THE COURT ERRED IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION.

The trial court refused to submit the question of deceased's violation of the rules for any purpose, even as bearing on the question of proximate cause. He attempted to leave to the jury the question of proximate cause in a general way and refused to permit the jury to consider the violation of this rule in that connection, saying, "I don't believe that is the law," and his ruling was sustained by the Minnesota Supreme Court.

The charge of the Court is in effect a withdrawal of the question of proximate cause. For the Court says, "that the decedent violated those rules, would not be a defense to the company, or defendant." Manifestly one of the causes of this accident was the violation by Ring of this rule. The Court tells the jury that this negligence of Ring's is no defense, which is equivalent to saying *his* negligence cannot be the proximate cause. This is said to the jury in such a plain and emphatic way at the conclusion of the charge and just as the case went to the jury, that it carried great weight. It was done by the Court with full and fair knowledge of the contention we now make. All that had previously been said about proximate cause was nullified.

We quote the following colloquy between Court and counsel:

"Court: Are there any suggestions, counsel?

Mr. Davis: I would ask the Court to charge the jury that if they in fact had a defective coupler, that if a rule was violated it was no defense and cannot be considered by the jury. The rules was introduced in evidence and goes to the jury, and for that reason plaintiff would ask the Court to charge the jury that if they find that defendant had a defective coupler and that that was the proximate cause of the injury, that they cannot sider the violation of any rule introduced, as that was no defense in this case. (535)

* * * * *

Court: Plaintiff has asked me to instruct you that the fact that the company had rules, which rules are in evidence, and that the decedent violated those rules, would not be a defense to the company, or defendant. That, I believe, is a correct interpretation of the law, that will not be a defense, the fact that he violated those rules. In other words, that acts of the plaintiff are no defense unless the act was the sole cause of the injury. (537)

Mr. Briggs: Will the Court extend that instruction so as to say that this question of rules may be taken into consideration by the jury in determining whether the defective draw-bar was the proximate cause of the accident?

Court: I don't believe that is the law as laid down by our Supreme Court.

Mr. Briggs: The Court understands that our contention is that the defective draw-bar

was not the proximate cause of the accident, and therefore that this rule should be taken into consideration of what that proximate cause was." (538)

With reference to the making of rules it is said:

"Not only has an employer a strict legal right, but there rests upon him a legal duty as well to promulgate rules and regulations for the guidance and protection of person who may engage in his services. There is correlatively an obligation resting upon employees to yield obedience to all proper rules and orders; and if an employee sustain an injury by reason of a violation of the employer's regulations, orders or commands, he will be barred of all right of recovery from the employer on the score of the latter's negligence" * * *

"Ordinarily the question whether his disobedience was the proximate cause of the injury is one for the jury's determination."

18 R. C. L., Sec. 152.

See Ann. Cas. 1912 A. 91 (85).

"Where the evidence is conflicting the question of whether the violation of the rule was or was not the proximate cause of the injury is properly submitted to the jury."

Hampton v. Chicago, etc., R. Co., 86 N. E. 243 (Ill.).

And putting it conversely:

"The violation of a rule by an employee where such violation is the proximate cause of the accident is negligence as a matter of law."

Fernette v. Pere Marquette Ry., 141 N.W. 1084 (Mich.).

There can be no doubt but what under certain conditions the violation by a servant of a regulation adopted by the master for the safety of the servant is negligence *per se* on the part of the servant.

G. N. Ry. Co. v. Hooker, 170 Fed. 154.

And such violation always goes to the question of negligence whether due to thoughtlessness or willfulness.

Gleason v. Detroit, 73 Fed. 647.

Lake Erie, etc., v. Craig, 80 Fed. 488.

In speaking of compensation cases, where even more strict liability is imposed, it is said:

> "Violations of rules designed to safeguard the employees is generally held, as a matter of fact, to constitute wilful misconduct, and to debar the employee, or his dependents, in case of death, from any right to recover compensation."
>
> 4 A. L. R. 119, note.

There can be no question but what the rule involved was reasonable and promulgated in aid of, to protect, and to benefit employees. It is not in opposition to any rule of law and was entitled to observance. In a case involving a similar rule the Court held it reasonable "and should be obeyed."

Bowers v. Atchison, etc., 107 Pac. 777 (Kas.)

Plaintiff claimed we are "resurrecting" this rule as a defense. To use such a term is a sheer mis-

statement of the evidence and of the law. We maintain that it cannot be arrogated to a place of no importance and excluded from the jury in considering whether the unfortunate result is the proximate effect of a faulty coupler.

We have shown by numerous citations from cases and encyclopedic works that violation of the rule constitutes negligence from whatever angle it is viewed. It follows that if it is evidence of negligence it must be considered together with the other acts of negligence, and the other intervening circumstances, to fairly determine proximate causation. Even aside from the other two intervening agencies we had a right to have this question submitted to the jury, for

> "Ordinarily the question whether his disobedience was the proximate cause of the injury is one for the jury's determination."
>
> 18 R. C. L., Sec. 152, and cases cited.

The Court below not only refused defendant's requested instruction that the rule *might* be taken into consideration in determining proximate cause, but affirmatively charged the jury that it *could not* be taken into consideration. (537-538.) And it thereby committed error that only a new trial can remedy.

Our contention is that petitioner had an absolute right under the Federal law to have *all* evidence of negligence considered by the jury in this respect, and the fact that this right was denied is assigned as error.

Conclusion.

Petitioner contends that it is entitled to judgment, on the ground that the negligence of Ring was the sole producing cause in law of the accident and that the defective coupler merely served as the occasion, providing an opportunity for the causal agencies to act, or at the most to have set them in motion; and on the further ground that the facts do not bring the case within the safety appliance act.

If this Court shall be of the opinion that petitioner is not entitled to judgment, then a new trial should be granted, on the grounds stated in the next preceding paragraph; that the decision of the Minnesota Supreme Court is erroneous; that petitioner has been deprived of rights given it under the Federal law; that the decision is at variance with the holdings of this Court and other Federal Tribunals; that erroneous directions were given to the jury and competent evidence as to negligence of deceased in violating rules and the application of this evidence as to proximate cause was excluded from consideration by the jury.

Respectfully submitted,

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